

CHAPTER 8

PROCUREMENT

I. INTRODUCTION.

The purpose of this chapter is to provide information about the federal requirements for procurement of supplies, equipment, and services. Additional related information is located in Chapter 2 - Program Operators, Chapter 4 - Equal Opportunity, Chapter 5 - Labor Standards, Chapter 7 - Accounting and Recordkeeping, and Chapter 12 - Monitoring. Chapter 5 contains a “Document Matrix” that identifies federal language that must be included in Request for Proposals (RFP) and Request for Qualifications (RFQ) as well as the required language and items in different types of contracts (e.g., consultant, construction). Chapter 12 – Monitoring, Checklists 1 and 9, provide lists of required documentation and federal language on the different procurement processes described in this Chapter. These lists are what state CDBG staff will use to monitor each procurement file. After reviewing this Chapter, feel free to call your state rep if you have any questions about how to conduct the process or what documentation needs to be in the procurement file at time of monitoring.

II. GRANTEE RESPONSIBILITIES .

This section covers general information about the procurement requirements:

- A. General provisions
- B. Summary of Federal requirements
- C. Bonding and insurance
- D. Use of local, small, minority and/or women-owned businesses
- E. Procurement Options
 - 1. Small Purchase
 - 2. Competitive Sealed Bid
 - 3. Competitive Proposals
 - 4. Non-competitive Proposals/Sole Source
- F. Other Options for Performing the work
- G. Continuing with a previously-selected contractor

A. General Provisions

The standards and procedures for procurement are intended to ensure that supplies, equipment, construction, and other services acquired in whole or part with federal funds are:

- obtained as efficiently and economically as possible; and,
- procured in a manner that provides, to the maximum extent practical, open and free competition.

Solicitations must explain all the requirements that the bidder/offeror has to meet for his or her bid/offer to be evaluated by the grantee. Solicitations for goods and services must be based on a clear and accurate description of the material, product, or service to be procured, and cannot contain features which unduly restrict competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

- placing unreasonable qualifying requirements on firms;
- requiring unnecessary experience and excessive bonding;
- specifying only “brand name” products instead of allowing “an equal” product;
- non-competitive pricing practices between firms or affiliated companies; and
- non-competitive awards to consultants on retainer contracts.

Awards are to be made to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the grantee, price and other factors considered. Any and all bids may be rejected when it is in the grantee’s interest to do so. The grantee must ensure that the award is made only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

B. Summary of Federal requirements

1. Records and files. According to 24 CFR 85.36(b)(9), the grantee must maintain records to detail the significant history of a procurement. The grantee must maintain files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract.

(See Chapter 7 for more on recordkeeping.)

2. Pre-qualified lists of vendors/contractors. If such lists are used, they must be current, developed through open solicitation, include adequate numbers of qualified sources, and must allow entry of other firms to qualify at any time during the solicitation period (24 CFR 85.36(c)(4)).
3. Unfair competitive advantage. To eliminate unfair competitive advantage, if the grantee has used a contractor to develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals, the grantee should exclude that contractor from the competition for such.
4. Debarred/ineligible contractors. The grantee must ensure that awards are not made to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549, "Debarment and Suspension" (24 CFR 85.35).
5. Written procedures for contractor selection. The grantee must have written selection procedures for procurement transactions, adequate to ensure that:
 - a. The purchase of unnecessary or duplicate items is avoided. Where appropriate, an analysis should be made of lease vs. purchase alternatives (24 CFR 85.36(b)(4);
 - b. Whenever possible, use of federal excess and surplus property, or of intergovernmental agreements for procurement or use of common goods and services should be considered as a way to foster greater economy and efficiency (24 CFR 85.36(b)(5) and (6));
 - c. All purchase orders (and contracts) are signed by the grantee's authorized official(s);
 - d. Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services;
 - e. Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized;
 - f. A cost or price analysis is performed for every procurement action, including contract modifications, and documentation to that effect is maintained in the grantee's files. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals (24 CFR 85.36(f)); and,

- g. Profit or fee is negotiated separately from price where competition is lacking or a cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of past performance, and industry rates for the area (24 CFR 85.36(f)(2)).
- 6. Contract pricing. The grantee must not use "cost plus a percentage of cost" pricing for contracts (24 CFR 85.36(f)(4)); in addition, the grantee should use "time and material" type contracts only after a determination is made that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk (24 CFR 85.36(b)(10)).
- 7. Protest procedures. The grantee must have protest procedures in place to handle and resolve disputes relating to procurement (24 CFR 85.36(b)(12)).
- 8. Documenting contractor performance. The grantee must have a documented system of contract administration for determining the adequacy of contractor performance (24 CFR 85.36(b)(2)).
- 9. Code of conduct. The grantee must have a written code of conduct governing employees, officers, or agents engaged in the award or administration of contracts (24 CFR 85.36(b)(3)).

C. Bonding/ Insurance and Federal Debarred /State License Status

All agencies or companies receiving CDBG funds must provide documentation of liability insurance, workman's compensation, unemployment and disability insurance. This proof of insurance should be attached to the agreement for services and be in the procurement file. Each agency /vendor/ recipient of CDBG funds must be checked to ensure they are not on the federal debarred list prior to executing any agreement with said recipient, and if the service being procured requires a state license (contractor's, engineer's, architect) then documentation that license is current will also required.

For construction or facility improvement contracts or subcontracts exceeding \$100,000, the grantee must ensure that its procurement meets the minimum federal requirements (24 CFR 85.36(h)) for bid guarantees, performance bonds, and payment bonds. These include:

- 1. A bid guarantee from each bidder equivalent to 5% of the bid price. The bid guarantee must be a firm commitment in the form of a bid bond, certified check or other negotiable instrument as assurance that the bidder is prepared

to execute a contract within the time specified for the bid amount;

2. A performance bond from the (sub)contractor for 100% of the contract price to secure the (sub)contractor's fulfillment of all obligations under the contract; and,
3. A payment bond from the (sub)contractor for 100% of the contract price, to assure payment of all persons supplying labor and material under the contract.

D. Use of local, small, minority and/or women-owned businesses

1. Federal regulations make it very clear that grantees should make every effort to use local business firms and contract with small, minority- owned, and women-owned businesses in the procurement process. Specifically, the grantee must take affirmative steps to use small firms, minority-owned firms, women-owned firms, or labor surplus area firms in the grantee's CDBG-financed activities (24 CFR 85.36(e)). **See Chapter 4 for list of agencies to contact for referral information about WBE/MBE firms (section VII. b) 6.).** For example, the grantee should:
 - a. Incorporate such businesses in solicitation lists whenever they are potential sources;
 - b. Ensure that such businesses are solicited when identified as potential sources;
 - c. Divide procurement requirements, when economically feasible, to permit maximum participation of such businesses; and,
 - d. Require prime contractors, when subcontracts are let, to take affirmative steps to select such firms.
2. In conformance with the requirements of Section 3 of the Housing and Community Development Act of 1968, to the greatest extent feasible, the grantee must award contracts for work to be performed to eligible business concerns located in or owned by residents of the target area to ensure that the employment and other economic opportunities generated by federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very-low income persons, particularly those who are recipients of government assistance for housing (see 24 CFR 570.607(b)). **See Chapter 4 for additional information about how to get in contact with Section 3 businesses (section VII. b) 7. to 13.).**

Note, however, that the desire to award contracts to local firms is not a legitimate excuse for avoiding an open and competitive procurement process.

E. Procurement Options

Please review Chapter 2 - Program Operators, for information about using subrecipient agreements or Memorandums of Understandings (MOU) to secure organizations to perform work paid for with CDBG funds. Using these types of agreements is not considered procurement because there is no competitive process. However, if a grantee uses a subrecipient agreement or MOU for activity implementation then procurement requirements will be passed down to the subrecipient or agency under the MOU and the grantee is responsible for monitoring that procurement process and ensuring it is done in compliance with the procedures outlined in this chapter. It is suggested that grantees withhold payment of CDBG funds to subrecipients or agencies under MOUs who procure services or supplies/equipment until verification of proper procurement is made.

If a grantee decides to use a procurement process to secure services or materials needed to implement CDBG funded activities then they must first set up a procurement file which will contain all the documentation that the applicable procurement process was followed.

Initial decision: Will the grantee select a third party to perform all or part of the grant-funded activity, using some method of procurement?

If no, and all of the work will be done in-house, then the grantee will not have to meet any federal procurement requirements.

If yes, then federal procurement requirements will apply. For each item or service being procured using the federal process, a procurement file needs to be established and maintained. Each file should have a cover sheet that describes, what is being procured, lists each step in the procurement process, and indicates what documents are included in the file to document proper compliance with the guidance given in this chapter.

There are several different processes that can be followed depending on the scarcity of the item, the type of service desired, and the cost of the purchase. Each of the different methods of procurement available under the federal regulations requires a slightly different process and different documentation. The procurement monitoring list in Chapter 12 of this manual provides a very good description of what documentation is needed for each type of procurement process and what federal language is needed in contracts or agreements to provide services. Chapter 5 contains a Document Matrix that provides guidance on what federal language is needed in Request for Proposals and Requests for Qualifications and contracts.

Call your state rep if you have any questions about how to conduct the process or what documentation needs to be in the procurement file at time of monitoring.

Starting the work:

In-House: If the grantee will use only its own staff to work on the grant, work may begin after the state contract is fully executed and the Department has provided written clearance of applicable special conditions.

Contracted: If the grantee wants to contract out for services, the grantee must go through a procurement process. If the total cost of the project from all funding sources is less than \$100,000, the grantee can procure services using one of several options discussed below. If the total cost of the project exceeds \$100,000, the grantee may not use the small purchase method.

If the work is hired out: Options for procuring a contractor. The grantee has several options:

1. Small purchase
2. Competitive sealed bid
3. Competitive proposals
4. Non-competitive proposals/sole source

No loss leader arrangements: The intent of federal regulations is to require maximum open and free competition. Any “loss leader” type of arrangement in which a consultant offers to provide free services before an applicant receives a grant in return for a future contract is prohibited by federal regulations.

Note about the procurement methods: Among the procurement approaches described below, the competitive sealed bid resulting in a firm, fixed price contract is the preferred procurement approach when there are numerous available and qualified providers, when the requirements and specifications are thoroughly detailed and are unlikely to change, and where the grantee has the opportunity to make the provider assume a large share of the risk for non-performance.

1. Small Purchase

Grantees may follow either their local small purchase procurement policy or the federal policy. If the local policy is used, it must be at least as stringent as the federal policy, described below.

The small purchase method may be used for procurement of \$100,000 or less in the aggregate, per 24 CFR 85.36(d) (1). A procurement of more than \$100,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach. Procurement of construction services should follow guidelines set out in Chapter 5 of this manual.

Competition is sought through oral or written price quotations. The grantee must document the receipt of an adequate number (usually three) of price or rate quotations from qualified vendors.

2. Competitive Sealed Bid [24 CFR 85.36 (d)(2)]

The competitive sealed bid is the preferred method for procuring construction services. This method must lend itself to a firm, fixed price contract (lump sum or unit price) where the selection can be made principally on the basis of price.

- a.. The grantee must advertise the Invitation for Bid (IFB) in publications of general circulation;
- b. The IFB must include complete and accurate specifications and pertinent attachments, and clearly define items or services needed, in sufficient detail for the bidders to properly respond;
- c. Bids must be opened publicly at the time and place stated in the IFB;
- d. The grantee must receive at least two or more responsible bids for each procurement transaction; and,
- e. If awarded, the contract must be given to the lowest responsive and responsible bidder. The grantee can, however, decide not to make the award to any of the bidders.

3. Competitive Proposals [24 CFR 85.36(d)(3)]

This method has two sub-parts—the Request for Proposal and the Request for Qualifications.

Request for Proposals

- a. The Request for Proposals (RFP) must clearly and accurately state the technical requirements for the goods and services required;

- b. The grantee must publicize the RFP, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete;
- c. Proposals must be solicited from an adequate number of qualified sources, consistent with the nature and requirements of the procurement;
- d. The grantee must conduct a technical evaluation of the submitted proposals to identify the responsible offerors;
- e. As necessary, the grantee must conduct negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the grantee's evaluation of the bidders' pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a "best and final" offer; and
- f. The grantee must award the contract to the most responsive and responsible offeror after price and other factors are considered through scoring the proposals or "best and final" offers according to predetermined evaluation criteria. The successful proposal/offeror must clearly be the most advantageous source of the goods and services.

Request for Qualifications

For procurement involving architecture or engineering services, the grantee may use the Request for Qualifications (RFQ) competitive proposal procedure whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. In these instances, price is not used as a selection factor.

Once the most-qualified firm is identified, only that firm is asked for a price proposal which is subject to negotiation of a fair and reasonable price. If negotiations with the selected firm are unsuccessful, this process is repeated with the next highest-ranked firm, until a fair and reasonably-priced contract can be awarded.

The grantee must take care to document the basis for its determination of the most qualified competitor and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may not be used to purchase other than architectural and engineering services (24 CFR 85.36(d)(3)(v)).

For applicants' information, the above-cited federal rule relating to the procurement of architectural and engineering (A/E) services is quoted verbatim:

“Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.”

This means that:

- Qualifications-based procurement can be used only for A/E services.
- A Request for Qualifications may be issued.
- The competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
- An RFQ cannot be used to purchase other types of services, even though A/E firms are potential sources to perform other types of services.

In addition, the federal procurement regulations generally discourage the use of local geographical preferences in the evaluation of bids or proposals except where mandated by federal statutes, due to the restrictions on open competition which result. However, in procuring architectural and engineering services, geographic location is permitted as a selection criteria provided this criterion leaves an appropriate number of qualified firms (24 CFR 85.36(c)(2)).

4. Non-Competitive Proposals/Sole Source [24 CFR Part 85.36 (d) (4)]

This method may be used only under very limited circumstances and **the grantee must obtain Department approval before using this method.**

When requesting permission to use this method, the grantee will have to show that another method of procurement was not feasible because:

- a. the item or service was only available from a single source;
- b. a public emergency or condition requiring urgency existed which did not permit the use of competitive procurement; or
- c. competition was determined to be inadequate after solicitation of proposals from a number of sources and only a single source responded.

A formal written request must be submitted to state CDBG staff along with documentation that sufficient outreach efforts had been made but there are not enough interested parties in the area who want to bid on the scope of work. State staff may request that the agency doing the procurement do additional outreach or change the scope of work to allow more vendors to respond. If the state agrees that sufficient outreach has been done and only one bidder is available to do the CDBG funded activity, then state staff will give formal approval of single or sole source procurement to the grantee.

F. Other Options for Performing the Work.

The following two options are not technically “procurement” methods because none of four methods described above are used to select the third party. However, these two options are frequently used by grantees as a means of selecting an organization other than the grantee’s staff to perform the work. They are listed here for reference and are more fully described in Chapter 2-Program Operators:

1. Delegating grant administration to another public entity
2. Using a Subrecipient Agreement

G. Continuing with a previously-selected contractor.

If the jurisdiction has a consultant under a pre-existing, multi-year contract, it is permissible to continue to use that consultant for the new grant as long as the activity to be carried out was outlined in the original scope of work used to procure the consultant, and the process used to procure the consultant met Federal requirements.

Please note that multi-year contracts should be limited to three years and to one specialty area, such as housing, public works, or economic development. A single RFP for CDBG administrative services including housing, public works,

and economic development is not consistent with federal procurement requirements. That is, an RFP of such broad scope would place unreasonable requirements on firms in order for them to qualify to do business. Therefore, HCD restricts three-year contracting to specific specialty areas. A single RFP to carry out all CDBG and HOME housing-related activities or all CDBG economic development-related activities is acceptable.

III. COMMON PROBLEMS AND QUESTIONS

- Failure to comply, or have subrecipients comply, with proper procurement process per federal regulations as described in this chapter.
- Absence of necessary in house cost analysis, procurement documentation, or federal language in the procurement documents.
- Vague or inadequate definition of the scope of services in the RFP, IFB, or the contract
- Sole Bid. The jurisdiction needs to get department approval after following procurement procedures.

Following are frequently asked questions regarding the federal procurement requirements.

1. Q: May a jurisdiction issue an RFP for consultant services to 1) prepare a CDBG application, and 2) if funded, carry out the proposed activity?

A: Yes, provided the RFP explicitly describes the full potential scope of work.
2. Q: Pursuant to a single RFP, may a jurisdiction enter into a three-year contract to carry out all CDBG activities on behalf of the jurisdiction?

A: No. A single RFP for CDBG administrative services including housing, public facilities, community facilities and public services, and economic development, is not consistent with CDBG procurement guidelines. An RFP of such broad scope would place "unreasonable requirements on firms in order for them to qualify to do business." Therefore the Department restricts three-year contracting to specific specialty areas. A single RFP to carry out all CDBG housing related activities or all CDBG economic development related activities would be acceptable.
3. Q: Under what circumstances would the Department consider extending the allowable three-year contracting term to a longer term?

A: The three-year limitation is consistent with longstanding HUD policy. In the interest of free and open competition which fosters small and minority business participation, the Department does not view reissuing an RFP

every three years as onerous to local jurisdictions. However, the three-year limitation applies to blanket "term" contracts, not project specific contracts, which would go to project completion even if the time required exceeded three years. For example, a consultant contract to prepare a CDBG planning and technical assistance grant application, conduct the study, prepare a related CDBG general allocation application, and carry out the funded activity may go beyond three years.

4. Q: If a jurisdiction knows someone who has worked for them in the past and is familiar with the jurisdiction's project, can the jurisdiction simply hire them to perform the work under a sole source arrangement?

A: No, this is not sufficient reason to justify a sole source procurement. The Jurisdiction must keep in mind the need to promote open and free competition, and should procure using one of the methods described in this chapter.

However, depending on whether the third party meets the definition of a subrecipient, the jurisdiction may be able to select the organization as a subrecipient. Please see Chapter 2- Program Operators, for more information.

5. Q: After receiving all bids, does a jurisdiction have to accept the lowest bid?

A: It depends. For RFP's, price is only one of the factors under consideration. For RFQ's, price is not one of the initial factors. For sealed bids, the award should be given to the responsible bidder whose bid, that conforms to all terms and conditions of the IFP, is lowest in price.

6. Q: If a jurisdiction advertises an RFP over a broad area and receives only one bid, can they accept this bid?

A: Yes, **with Department approval**, the jurisdiction can accept the one bid. The jurisdiction must also document that they have followed proper procurement procedures including a "cost analysis" of the project. The adequacy of the advertisement is also a consideration of meeting the intent of the procurement requirements. If this is satisfied, the CDBG Representative will send a letter indicating the Department's approval.

7. Q: Are a jurisdictions staff, hired on a contract basis subject to the Federal procurement process if they work on CDBG projects?

A. No. They will be exempt from the procurement process if they are considered employees of the jurisdiction.

IV. DEPARTMENT'S ROLE

Department staff will review the grantee's procurement procedures when monitoring the grant. Department staffs are available to assist grantees with questions concerning the procurement requirements.

V. REFERENCES

- 24 CFR 85, referred to as the "HUD common rule," establishes administrative requirements for grants to local government. 24 CFR 85.36 specifically addresses procurement. This chapter is largely based on the language contained in 24 CFR 85.36.
- 24 CFR 570.502(a)(12) invokes the "HUD common rule" for the State CDBG program.
- Federal Circular OMB A-87 establishes principles and standards for determining costs applicable to grants, contracts, and other agreements with State and local governments.
- Section 3 of the Housing and Urban Development Act of 1968, as amended, provides that to the greatest extent feasible, opportunities for training and employment that arise through State CDBG-financed projects shall be given to lower-income residents of a project area, and that contracts awarded in connection with such projects be awarded to businesses located in the project area or businesses owned, in substantial part, by residents of the project area.
- Section 109 of the Housing and Community Development Act of 1974, as amended, provides that no person shall be excluded from participation or employment, or be denied benefits, or be subjected to discrimination on the basis of race, color, national origin, or sex under any program or activity funded in whole or in part by the CDBG Program.
- Title VII, Civil Rights Act of 1964, provides that no person shall be excluded from participation, denied program benefits, or subjected to discrimination based on race, color, or national origin under any program or activity receiving federal financial assistance.
- Executive Order 11246, as amended, provides that no person shall be discriminated against on the basis of race, color, religion, sex, or national origin in any phase of employment during the performance of federal or federally-assisted construction contracts.

VII. SUPPORTING MATERIALS -- None